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## Review Article

# The Third Restatement of Restitution, the role of unjust enrichment and Australian law

Joachim Dietrich\*

*The American Law Institute's **Restatement Third, Restitution and Unjust Enrichment**, published in 2011, may well re-activate interest in restitution in the United States. The principle of unjust enrichment is central to the Restatement. This article reviews the Restatement, first providing an overview of its methodology and the fundamental distinctions that it draws. Second, after a brief consideration of the role of unjust enrichment in (mostly English) academic theory and in Australian law, this article will consider, compare and critique the general role of that concept in the Restatement. I conclude that the Restatement takes a very different approach to that of the theorists: it is a pragmatic work that accepts the limitations of unjust enrichment and rejects much of the dogma associated with unjust enrichment theory.*

### Introduction

The American Law Institute's *Restatement Third, Restitution and Unjust Enrichment*,<sup>1</sup> is a two volume, monumental work of legal scholarship published in 2011, authored by its reporter, Professor Andrew Kull, and numerous advisers.<sup>2</sup> A new *Restatement* has been a long time in coming. After the publication of the *First Restatement*<sup>3</sup> in 1937, a second *Restatement* was commenced but abandoned before completion, perhaps reflecting a lack of interest in the United States in restitution. That lack of interest is acknowledged in the *Restatement* itself, which notes that 'Restitution has remained intellectually important in other common-law countries, but in the United States attention to it has declined over the past half-century'.<sup>4</sup> Professor David Partlett has suggested that one reason for this decline is a result of the significant influence of legal realism in the United States.<sup>5</sup> The lack of respect for restitution as a subject of academic interest is a product of

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1 American Law Institute Publishers, St Paul, 2011 ('*Restatement*').

2 The ALI notes that 'most of the credit' for the work must go to Andrew Kull (*Restatement*, Foreword, p xiii) and clearly, his considerable intellectual imprint is evident throughout the work.

3 American Law Institute, *Restatement First, Restitution and Unjust Enrichment*, ALI Publishers, St Paul, 1937, authored by W A Seavey and A W Scott.

4 *Restatement*, above n 1, p xiii. All references are to Vol 1 except where indicated.

5 D Partlett, 'Restitution: Ancient Wisdom' (2003) 36 *Loyola of Los Angeles L Rev* 975. Partlett describes the division (particularly evident in US law schools) between a doctrinal, 'embedded' view of the law versus a 'non-embedded' approach that prizes an external view

its status as 'too doctrinal, almost too legal for modern American scholars'.<sup>6</sup> Similarly, Chaim Saiman suggests that American legal discourse and methodology is starkly different to doctrinal scholarship that flourishes in English law, such that the 'taxonomic account' of restitution of the late Professor Peter Birks, the foremost unjust enrichment theorist, is 'an unnecessary and perhaps even unwelcomed development in American law'.<sup>7</sup> Presumably, the new *Restatement* will re-activate interest in restitution in the United States.

This article has several aims. First, the article reviews the *Restatement*, providing an overview of its methodology and the fundamental distinctions that it draws. Second, after a brief consideration of the role of unjust enrichment in (mostly English) academic theory and in Australian law, this article will consider, compare and critique the general role of that concept in the *Restatement*. Finally, this article will illustrate these more general points by considering how some specific topics are dealt with in the *Restatement*. This last task can only be undertaken very selectively, given the depth and breadth of coverage of the *Restatement*, comprising two volumes totalling about 1400 pages.

### The structure and approach of the *Restatement*

Like other Restatements, the *Restatement* promulgates a number of general rules (70 in total), that are derived from the body of case law in various jurisdictions in the United States, in order to accurately encapsulate the legal rules that have developed. In exceptional cases, where a statement of principle does not accord with the majority legal position in the case law, the *Restatement* advances cogent reasons justifying the position that has been adopted.<sup>8</sup> Although the rules are beautifully drafted, it is the detailed explanation of those rules in the commentary that gives substance to them. The commentary provides rational explanations and reasons for why a particular choice of rule has been adopted, and generally avoids conclusory labels.<sup>9</sup>

Further, the *Restatement* illustrates the operation of the rules by giving succinctly stated but realistic factual examples, usually based on real cases, and the likely resolution to each example. This is one of the *Restatement's* great strengths. Given a factual scenario, lawyers know what they are dealing with: they can immediately apply their own understanding of the law to the

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of the law. The terminology is coined by T D Rakoff, 'Introduction' (2002) 115 *Harv L Rev* 1278 at 1285–7. The 'non-embedded' approach predominates in the United States with legal realism one manifestation of this approach.

6 See *ibid*, at 977 (footnote omitted).

7 C Saiman, 'Restitution in America: Why the US Refuses to Join the Global Restitution Party' (2008) 28 *OJLS* 99 at 126. Saiman states that this is the result of the 'anti-doctrinalism' exhibited in American legal discourse. Saiman's article considers earlier drafts of the new *Restatement* and I have found it particularly helpful in preparing this review.

8 See, eg, above n 1, p 644: rule in relation to quantum meruit under a losing contract a 'minority rule', though the majority cases, according to the *Restatement*, are often explicable on other, justifiable grounds than those stated in the cases themselves (pp 644–6) and see n 19 below.

9 See, eg, *ibid*, p 384.



facts, weigh up competing considerations and arguments, and compare their solutions and reasons with those that are given. For a practitioner seeking resolution to specific factual scenarios not previously dealt with in Australian law, and for the law teacher looking for inspiration for problem setting, there is a wealth of material here.

The foundation principle of the *Restatement* is in § 1: 'A person who is unjustly enriched at the expense of another is subject to liability in restitution'. It is of particular interest that the *Restatement* describes the claim as a 'liability in restitution' and that it retains 'Restitution' in its title, despite publicly aired objections by Birks.<sup>10</sup> In part, this retention is a result of history: the *First Restatement* adopted 'Restitution' as describing both the liability rules and the remedies and restitution's embedded status in American legal terminology ensures its continued use, though it must be noted that there is some hesitancy in the *Restatement* in defending it.<sup>11</sup> Nonetheless, the *Restatement* states:

The title of the present Restatement incorporates both terms — not to imply that they are correlatives, much less synonyms, but to convey as clearly and immediately as possible an accurate idea of the overlapping topics treated herein.<sup>12</sup>

No doubt, the new *Restatement* has been awaited with some excitement. One undoubted source of interest, from my perspective, is how the *Restatement* utilises unjust enrichment, in light of the major academic and judicial developments in other common law jurisdictions, particularly in the United Kingdom. How does the *Restatement* compare with the technical, doctrinal approach of 'unjust enrichment theorists', by which I mean Birks and other, mostly academic, writers that have broadly embraced his methodology (if not all the specifics of his theory)?

Thankfully, the *Restatement* takes a very different approach: to generalise,

10 P Birks, 'A Letter to America: The New Restatement of Restitution' (2003) 3(2) *Global Jurist Frontiers* art 2, noted and rebutted by the *Restatement*, above n 1, p 12. Birks rejected the title 'restitution', arguing that it is semantically unsound: 'Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment' (1999) 23 *MULR* 1 at 10. See also his final work, seeking to set out a concise account of the law: *Unjust Enrichment*, 2nd ed, OUP, Oxford, 2005 and from a similar Australian perspective see J Edelman and E Bant, *Unjust Enrichment in Australia*, OUP, Australia, 2006, particularly pp 3–6. Other commentators continue to argue for the continued use of the label 'Restitution'. Cf A Tettenborn, 'Misnomer: A Response' in W R Cornish, R Nolan, J O'Sullivan and G Virgo (Eds), *Restitution — Past, Present & Future: Essays in Honour of Gareth Jones*, OUP, Oxford 1998, p 31, at p 36. Those who do, do so from very different and contradictory standpoints. Some, who Birks calls multi-causalists, see restitution as a response to different causative event and either wish to study restitution as a remedial response (eg, G Virgo, *The Principles of the Law of Restitution*, 2nd ed, OUP, Oxford, 2006), or are sceptical about the role of unjust enrichment as a causative event altogether (eg, I M Jackman, *The Varieties of Restitution*, Federation Press, Sydney, 1998). Others, who Birks calls mono-causalists, see restitution as *only ever* arising from unjust enrichment and hence defend the synonymous use of restitution and unjust enrichment (eg, M McInnes, 'Unjust Enrichment and the Perfect Quadrature Thesis' [1999] *Restitution L Rev* 118). See Birks, *Unjust Enrichment*, *ibid*, pp 277–81.

11 See the *Restatement*, above n 1, pp 3–12, particularly p 12, which notes some difficulties with the use of this term, and p 7: 'most of the law of restitution might more helpfully be called the law of unjust . . . enrichment.'

12 *Ibid*, p 7.



it is a pragmatic work that seeks accurately to describe the law as developed in the US courts or, where there is uncertainty in the law or a lack of uniformity between jurisdictions, the best solutions to specific problems. And although the *Restatement* uses unjust enrichment as the central concept to describe and justify in general terms the liability rules and remedies, it does so with clear acceptance of its limitations. The commentary on § 1 states:

Such is the inherent flexibility of the concept of unjust enrichment that almost every instance of a recognised liability in restitution might be referred to the broad rule of the present section. The same flexibility means that the *concept of unjust enrichment will not, by itself, yield a reliable indicator of the nature and scope of the liability imposed by this part of our legal system*. It is by no means obvious, as a theoretical matter, how 'unjust enrichment' should best be defined; whether it constitutes a rule of decision, a unifying theme, or something in between; or what role the principle would ideally play in our legal system. Such questions preoccupy much academic writing on the subject. This Restatement has been written on the assumption that the law of restitution and unjust enrichment can be usefully described without insisting on answers to any of them.<sup>13</sup>

This conclusion is, on its face, startling, since precisely so much ink is spilt on exactly such academic debate amongst unjust enrichment theorists. Yet the '*Restatement's* agnosticism', to use Saiman's term, is displayed towards much of these (mostly English) theoretical debates.<sup>14</sup> Indeed, the *Restatement* analyses legal issues by reference to the competing specific principles and factors that are relevant to determining the outcomes: unjust enrichment is not generally used to achieve this detailed work. Importantly therefore, although unjust enrichment is a broad generic concept, it does not in all cases dictate the specific rules or the outcomes of cases. Even in the paradigm case of restitution, the recovery of mistakenly conferred benefits, the *Restatement* states that unjust enrichment is 'too general to be of much practical assistance' such that 'courts have developed specific rules for particular types of mistake . . . instead of relying on general principles of unjust enrichment'.<sup>15</sup> Indeed, the *Restatement* goes further and acknowledges that not all of restitution is about unjust enrichment: 'there are numerous situations in which a claimant's undoubted right to restitution (or restoration) of something does not depend on the unjust enrichment of the defendant'.<sup>16</sup>

Importantly, § 1 of the *Restatement* must be read alongside § 2, setting out certain fundamental limiting principles. These include that a valid contract that defines the parties' obligations within its scope, displaces 'to that extent any inquiry into unjust enrichment' (§ 2(2)); and that '[l]iability in restitution

13 *Restatement*, above n 1, p 4 (emphasis added). See also p 6: 'And yet the concepts of unjust enrichment and restitution (in the literal meaning of "restoration") correlate only imperfectly'.

14 Saiman, above n 7, at 120–1, gives the example of the question of whether one needs to establish unjust factors, or whether there is a broader principle of liability wherever there is an 'absence of basis' for a transfer, as advocated by Birks, *Unjust Enrichment*, above n 10. Compare the extensive discussion in Birks, Chs 5 and 6, and the brief dismissal of the relevance of the point in the *Restatement*, above n 1, pp 5–6.

15 *Restatement*, above n 1, p 46.

16 *Ibid*, pp 6–7. The following example is given at p 7: 'Thus if a transfer has been induced by misrepresentation, the transferor is entitled to rescission and restitution even if the transferee — having paid market value — cannot plausibly be said to have been enriched.'

may not subject an innocent recipient to a forced exchange' (§ 2(4)). These provisions make contract central to the operation of the relevant legal rules and effectively relegate unjust enrichment to a subsidiary role. This is consistent with the Australian legal position, which generally<sup>17</sup> precludes a claim in restitution where an effective contract operates in relation to the transaction in question.<sup>18</sup> Although unjust enrichment theorists accept that a valid contract generally trumps an unjust enrichment claim, the *Restatement* prefers contract in far starker terms than English scholars, leading also to 'substantive disagreements' as to outcomes, as Saiman probably correctly notes.<sup>19</sup> One related difference is that many circumstances of restitution under contracts terminated for breach, which many unjust enrichment theorists describe in terms of independent unjust enrichment, are treated in the *Restatement* as purely contractual remedies for breach alongside other contractual remedies.<sup>20</sup> Indeed, the *Restatement* concedes that conceptually, these rules would fit better in contract but for pragmatic reasons are included in the *Restatement*.<sup>21</sup>

The *Restatement* makes the division, broadly accepted in Australian law,<sup>22</sup> between (1) restitution for wrongs, and (2) where defendants have received benefits from claimants,<sup>23</sup> by subtraction from the claimants. In the former category, a benefit will have been obtained from third parties, but the claimants have a claim based on the wrong that was done to them. Interestingly, many unjust enrichment theorists acknowledge that unjust enrichment is not an explanation of the cause of action, which resides firmly in the wrong that justifies the remedy; as such, restitution is merely one remedy amongst others that a claimant may choose. Still, despite this, the *Restatement* frequently describes restitution for wrongs as explicable in terms of reversing unjust enrichment.<sup>24</sup> It seems clear, however, that the *Restatement*

17 See, however, *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516; 185 ALR 335; [2001] HCA 68; BC200107592, where restitution of a payment under the relevant, still effective contract, was allowed; however, the payment was severable from the other contractual payments and the relevant risk of the payment that was the subject of the claim had not been allocated.

18 See *Lumbers v W Cook Builders Pty Ltd (In Liq)* (2008) 232 CLR 635; 247 ALR 412; [2008] HCA 27; BC200804500.

19 Saiman, above n 7, at 123, and n 136 and see the example at 123–4. The *Restatement's* approach leads to the conclusion that where a party terminates a contract for breach and seeks a quantum meruit for work done, then the contract price ought to impose a ceiling on recoverable claims. Although this conclusion is also consistent with the views of most unjust enrichment theorists (see *Restatement*, above n 1, p 645) it is contrary to the approach in *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; 9 BCL 40. Interestingly, the *Restatement* notes, p 645, that '[m]any of the decisions purporting to award "restitution" unlimited by the contract price may be seen, on closer examination of the facts, to employ the vocabulary of restitution as a means to compensate plaintiffs for damages that are merely hard to prove'.

20 *Restatement*, above n 1, §§ 37–39 and pp 479–80, 606–12.

21 *Ibid*, p 612.

22 See, eg, K Mason, J W Carter and G J Tolhurst, *Mason and Carter's Restitution Law in Australia*, 2nd ed, LexisNexis Butterworths, Australia, 2008, at [159]–[161]. See also *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 557; 128 ALR 201; (1995) 69 ALJR 362; BC9506414.

23 This is the terminology in the *Restatement* and I adopt it here.

24 *Restatement*, above n 1, p 10.



is using the term merely to describe the particular remedy, not to assert the reasons for that remedy (which is the tort, breach of fiduciary duty, or other wrong).

The second type of claim is one in which the restitutionary claim arises irrespective of the commitment of any wrong, and the claim is an independent one in unjust enrichment based on a *corresponding loss* of the claimant.

The *Restatement* follows this division in its organisation. Volume 1 includes liability rules that are said to arise from unjust enrichment and where the enrichment has been obtained from the claimant. Volume 2 deals with liability for wrongs giving rise to benefit based remedies, as well as with remedies generally and 'defenses'. The 'remedies and defenses' sections are of particular interest, as will be seen below, since the measure of enrichment varies considerably depending on the reasons for 'restitution', such that even loss allocation can occur; and fault (usually of the defendant, but also sometimes of the claimant) is critical to the precise working out of the appropriate remedy. As a result, some cases of 'restitution' dealt with in the *Restatement* are about responses other than returning a benefit retained. Loss compensation or allocation are plausible outcomes in many cases, as discussed below.

The final general point that I wish to note is that the *Restatement* does not draw a distinction between legal or equitable rights of restitution (§ 4(1)). This approach means that there is no need to establish the inadequacy of remedies at law (§ 4(2)). Hence, the *Restatement* nearly always 'describes liabilities and remedies . . . without reference to their origins in law or equity'.<sup>25</sup> In this fusionist approach, the *Restatement* is at odds with the position in Australia, where the question of the extent of fusion still engenders considerable debate with competing forces pulling in different directions.<sup>26</sup> The fusionist approach will be welcomed by unjust enrichment theorists, who are staunch advocates of a taxonomy that is independent of any historical jurisdictional distinctions.<sup>27</sup>

## Academic developments in unjust enrichment theory

The *Restatement* arrives after more than two decades of considerable academic theoretical writing on unjust enrichment and its role in the law, particularly in the United Kingdom but also Australia and Canada. In particular, the late Professor Birks was at the forefront of imposing a rigorous structure and taxonomy on the law of unjust enrichment and, indeed, private law as a whole.<sup>28</sup> Much has been written about this elsewhere. It suffices to say

25 Ibid, p 28 (emphasis added).

26 Eg, as is evidenced by the devotion of a prestigious conference and book of conference papers to the topic of 'Fusion': see S Degeling and J Edelman (Eds), *Equity in Commercial Law*, Thomson, Sydney, 2005. The papers reflect a diversity of views, and of the rigidly anti-fusionist approach of R Meagher, J D Heydon and M Leeming, *Meagher, Gummow and Lehane's Equity Doctrines and Remedy*, 4th ed, LexisNexis Butterworths, Sydney, 2002, the foremost equity textbook in Australia.

27 See Birks, *Unjust Enrichment*, above n 10, and P Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *UWALRev* 1, and A Burrows, 'We Do This at Common Law But That in Equity' (2002) 22 *OJLS* 1.

28 For criticism of the broader taxonomical project, see J Dietrich, 'What is "Lawyering"? The



that Birks advocated a theory-driven approach to legal reasoning<sup>29</sup> and set out stages of analysis for all unjust enrichment problems, such that liability depends on the answers to five questions:<sup>30</sup>

- 1) Was the defendant enriched?
- 2) Was the enrichment at the expense of this claimant?
- 3) Was the enrichment unjust?
- 4) What kind of right did the claimant acquire?
- 5) Does the defendant have a defence?

Of itself, these might seem rather general, particularly because the stages are themselves derived directly from, indeed, are little more than a restatement of, the concept of unjust enrichment itself.<sup>31</sup> But these elements are merely the starting point for much theorising about the precise meaning and content of these stages of analysis, with considerable intellectual energy devoted to this task.<sup>32</sup> Indeed, in my view, Birksian unjust enrichment theory tends toward a dogmatic and restrictive legal approach.<sup>33</sup> It is not an overstatement to say that 'unjust enrichment' has become exceedingly complex.<sup>34</sup>

Given the very detailed exposition of the meaning of the individual elements, this may lead to the theory, and the content of the stages of inquiry, subsuming the individual liability rules that might otherwise apply absent unjust enrichment. The specific details of the rules will be fused into the 'unjust factors' or the definition of 'enrichment'. Hence, unjust enrichment is

Challenge of Taxonomy' (2006) 65 *CLJ* 549 and J Dietrich, 'The "Other" Obligations Category in the Classification of Obligations' in A Robertson (Ed), *The Law of Obligations: Connections and Boundaries*, UCL Press, London, 2004, Ch 7.

29 See, eg, P Birks, *An Introduction to the Law of Restitution*, Clarendon Press, Oxford, 1989 rev ed, Chs I–V generally, and particularly pp 19–21, and *Unjust Enrichment*, above n 10.

30 Birks, *Unjust Enrichment*, above n 10, p 39.

31 Cf P Birks, 'Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment' (1999) 23 *MULR* 1 at 7.

32 See generally, Birks, *Unjust Enrichment*, above n 10. There appears to be considerable judicial acceptance of this approach in the United Kingdom: see, eg, *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49; [2007] AC 558; [2007] 1 All ER 449; [2006] 3 WLR 781 and *Sempra Metals Ltd v Her Majesty's Commissioners of Inland Revenue* [2007] UKHL 34; [2008] 1 AC 561; [2007] 4 All ER 657; [2007] 3 WLR 354 which illustrate the English courts engagement with unjust enrichment theory, and the adoption of the stages of analysis.

33 See J Dietrich, 'Giving Content to General Concepts' (2005) 29 *MULR* 218, particularly at 230–3.

34 On the complexities of unjust enrichment, see, eg, Hedley's conclusion that 'the subject has become more and more technical ... [but] is acknowledged to explain less and less ... There is more and more schematising and theorising, to less and less effect'. See S Hedley, 'The taxonomic approach to restitution' in A Hudson (Ed) *New Perspectives on Property Law, Obligations and Restitution*, Routledge-Cavendish, United Kingdom, 2004, Ch 7, p 152 and generally; and also S Hedley, 'The Empire Strikes Back? A Restatement of the Law of Unjust Enrichment' (2004) 28 *MULR* 759 at 781:

The high degree of precision that Birks demands ensures that there is a continual battle simply to keep academic theory and judicial pronouncements within hailing distance of one another. The language is becoming denser and more intense. Birks ... acknowledges that his approach is making unjust enrichment abstract and technical.

Practitioners have also expressed concern about the complexity of the theory: see the views noted by A Burrows and E Peel (Eds), *Commercial Remedies: Current Issues and Problems*, Oxford University Press, Oxford, 2003, 'Restitution of Unjust Enrichment: Review of Discussion', p 186.

used to rationalise past decisions, solve future problems and shape liability rules.<sup>35</sup> All this can be contrasted with the *Restatement* which notes that the 'understandable temptation to limit the far-reaching notion of unjust enrichment within the manageable confines of a checklist . . . usually leads to trouble'.<sup>36</sup>

Another feature of Birks' theorising on private law is his advocacy of a linear approach to remedy in which causes of action are strictly classified and linked to their concomitant remedy, as compared with remedial discretion which encompasses the idea that courts may choose from a range of possible remedies in response to a particular cause of action.<sup>37</sup> Birks strongly criticised remedial discretion as a retreat from rationality and a move towards 'intuitive' decision-making.<sup>38</sup> Again, this is contrary to the *Restatement's* approach, with its flexible approach to remedy, including proprietary remedies (a particular focus of Birks' disapproval) as discussed below.

Overall, then, it appears from this brief overview that Saiman is correct in concluding that, in nearly all respects, Birks' theories are quite alien to US jurisprudence, methodology and discourse. As Saiman states: 'Birks assumed that even the most difficult of legal disputes can be apolitically resolved via the conceptual analysis of legal rules . . . It is exactly this mode of reasoning that engenders deep scepticism within the American academy.'<sup>39</sup>

## The role of unjust enrichment in Australia

In Australia, unjust enrichment theory has been sceptically received by the High Court, despite its favourable reception by many academics and some lower courts, and the prominence given to unjust enrichment in the UK House of Lords (now the Supreme Court). The High Court has asserted, in one case

35 Emblematic of the scale of the transformation being sought to be attained here are the attempts to change the whole language of the law, to re-badge the existing legal rules and concepts and to add new ones. For example, terms such as 'quasi-contract', 'restitution' (as describing the category of causes of action), 'quantum meruit' and 'money had and received' are to be banished. Terms such as 'free acceptance', 'subjective devaluation', 'unjust enrichment' and 'interceptive subtraction' are part of the new language of the law. The changes in language do not necessarily make the subject easier to understand and may even lead to changes in the law. As Hedley, 'The taxonomic approach to restitution', *ibid.*, p 154 has said, unjust enrichment theorists 'say they are against old obscure terminology . . . They mean that they want to replace it with new, equally obscure terminology . . . which might almost have been designed to discombobulate and alienate their listener'.

Interestingly, the *Restatement* uses terms such as quantum meruit, but eschews much of the 'modern' terminology.

36 *Restatement*, above n 1, p 15.

37 Justice Keith Mason of the NSW Court of Appeal sums up the progression of legal thought when he states that as a 'rough generalisation . . . we have progressed from the notion of "where there's a remedy there's a right past the notion of "where there's a right, there's a remedy", to the notion of "where there's a right, there's an issue of remedies'. See the Hon Justice K Mason, 'Opening Address' (1998) 13 *JCL* 1 at 1.

38 Compare P Birks, 'Three Kinds of Objections to Discretionary Remedialism' (2000) 29 *WALR* 1 at 17.

39 Saiman, above n 7, at 106–7.

with strong criticism of those who flirt with the opposite views,<sup>40</sup> the serious limitations of the unjust enrichment concept. That concept has been variously described, by Gummow J, as being restrictive in its effect, as a form of 'top-down reasoning' that dictates outcomes,<sup>41</sup> distorts 'well settled' (equitable) principles, and generates fictions, so that dogma restricts 'substance and dynamism' in the law.<sup>42</sup> These sentiments were unanimously endorsed by five members of the court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*.<sup>43</sup> More recently, in *Lumbers v W Cook Builders Pty Ltd (In Liq)*<sup>44</sup> four members of the High Court stated that unjust enrichment is not a 'principle which can be taken, as a sufficient premise for direct application in particular cases'.<sup>45</sup>

There is therefore in the court strong resistance to those manifestations of unjust enrichment theory in which unjust enrichment forms part of a strict taxonomical and conceptual framework that dictates particular stages of inquiry for all cases of restitution.

## The role of unjust enrichment in the *Restatement*

### Introduction

In light of these developments, I propose to consider how unjust enrichment is used in the *Restatement*. Although unjust enrichment is central to the whole

40 See, eg, the criticisms by the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851 of the NSW Court of Appeal decision overturned in that appeal.

41 See Gummow J in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516; 185 ALR 335; [2001] HCA 68; BC200107592 at [73]. 'Top-down reasoning' is reasoning 'by which a theory about an area of law is invented or adopted and then applied to existing decisions to make them conform to the theory and to dictate the outcome in new cases'. The term derives from Judge Posner and is also referred to by McHugh J in *McGinty v Western Australia* (1996) 186 CLR 140 at 232; 134 ALR 289; (1996) 70 ALJR 200; BC9600206. Gummow J (at [72]) cautions against:

judicial acceptance of any all-embracing theory of restitutionary rights and remedies founded upon a notion of 'unjust enrichment'. To the lawyer whose mind has been moulded by civilian influences, the theory may come first, and the source of the theory may be the writing of jurists not the decisions of judges. However, that is not the way in which a system based on case law develops; over time, general principle is derived from judicial decisions upon particular instances, not the other way around.

42 See *ibid*, at [74]. Gummow J concludes:

There is support in Australasian legal scholarship for considerable scepticism respecting any all-embracing theory in this field, with the treatment of the disparate as no more than species of the one newly discovered genus.

43 (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851 at [151]–[156] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ. The joint judgment seemingly considers it to be inimical to common law judicial method and reasoning, particularly when equitable principles are at issue. The joint judgment also rejects, in a reference to Birks' school of unjust enrichment theory, 'a mentality in which considerations of ideal taxonomy prevail over a pragmatic approach to legal development': at [154].

44 (2008) 232 CLR 635; 247 ALR 412; [2008] HCA 27; BC200804500.

45 See *ibid*, at [85], per Gummow, Hayne, Crennan and Kiefel JJ (in a joint judgment) and more generally, at [83]–[86]; and see also *Friend v Brooker* (2009) 239 CLR 129; 255 ALR 601; [2009] HCA 21; BC200904502 at [7] per French CJ, Gummow, Hayne and Bell JJ. Some of these views echo views expressed by this author prior to these decisions. See J Dietrich, *Restitution: A New Perspective*, Federation Press, Sydney, 1998.



Restatement and, at times, its role may even be overstated,<sup>46</sup> for the most part, the *Restatement* exhibits a pragmatic and flexible approach to unjust enrichment and does not adopt the doctrinal approaches of the theorists. As already noted above, the *Restatement* uses the concept as a generic principle that has some obvious guiding influence, but the *Restatement* accepts that not all of the law of restitution is explicable in terms of unjust enrichment. Further, the precise rules cannot be articulated by the use of more technical refinements of unjust enrichment, nor can they be supplanted or replaced by it. Finally, the specific rules and their application are not always consistent with remedying unjust enrichment via the restitution of benefits.

These general propositions will be supported with some specific examples, starting with the role of fault in relation to liability, as well as in the change of position defence in particular. I will then briefly consider the *Restatement's* approach to proprietary remedies, and will then conclude with consideration of how the *Restatement* resolves two specific problems dealt with by the High Court.

### 'Fault'

One significant difference between English unjust enrichment theory and the general approach of the *Restatement* that is evident throughout the work relates to the relevance of 'fault'. According to unjust enrichment theory, a defendant's obligation to make restitution is said to be 'strict but fragile'<sup>47</sup> (that is, subject to defences). So it is said that '[f]ault can be relevant to the defence [of change of position] . . . but should be ignored when considering the ground of restitution'.<sup>48</sup> Hence, leaving aside the acknowledged but narrow role of the fault of a defendant, *but not a claimant*, in change of position, fault is sidelined and its relevance minimised. By way of comparison, the *Restatement* gives a significant conceptual role to broadly defined notions of 'fault' (§ 52(1) quoted below). Such fault includes both conduct of defendants (for example, in causing a particular transaction) and, at times, on the part of claimants. Such fault is relevant in determining: (1) liability, including by balancing the respective conduct of the parties; (2) more importantly, the measure of any such liability, and (3) the operation of applicable defences. On the *Restatement's* approach, the measure of 'enrichment', and hence the remedy, can vary as a result of, and is moulded according to, relevant fault factors, so that in some cases, 'restitution' is not

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46 Eg, the rules on fraud in § 13 are situated in Vol 1 of the *Restatement*, and hence within independent unjust enrichment liability. Yet the commentary on § 13 acknowledges that damages are always an alternative to any restitutionary response such as rescission and consequent restitution. Indeed, § 13 does not even set out the elements of fraud: the cause of action is firmly within the law of torts. It therefore appears that restitution is merely one possible remedy amongst others and that 'fraud' could thus more appropriately be seen as in a different category of liability, in the same way that the *Restatement* treats some restitutionary contract remedies (discussed text to nn 20–21 above). The *Restatement* in this context appears to be using unjust enrichment to *describe* one available remedy, rather than to explain the liability rule.

47 See, eg, P Birks, 'Knowing Receipt: Re Montagu's Settlement Trusts Revisited' (2001) 1(2) *Global Jurist Advances* Art 2 at 17.

48 G Virgo, 'Enrichment: The Case of the Cherished Mark' (2004) 63 *CLJ* 280 at 282.

focused on the return of benefits at all. Instead, it achieves other goals such as loss allocation and compensation where no real benefit has been obtained or retained.

The *Restatement's* approach is evidenced by the general scheme of §§ 49–52, a scheme that acknowledges that there are many different ways in which enrichment can be measured (§ 49) and indeed, that ‘non-innocent’ defendants may be subject to much more onerous burdens than merely returning a surviving enrichment.

For example, § 52(1) states:

A defendant who is not a conscious wrongdoer (§ 51(3)) may nevertheless be responsible for receiving, retaining, or dealing with the benefits that are the subject of a restitution claim. For purposes of this section, a defendant bears responsibility when a significant cause of the defendant's unjust enrichment is the defendant's

- (a) negligence;
- (b) misrepresentation, whether tortious or not;
- (c) breach or repudiation of a contract with the claimant, whether enforceable or not;
- (d) unreasonable failure, despite notice and opportunity, to avoid or rectify the unjust enrichment in question; or
- (e) bad faith or reprehensible conduct.

Accordingly, under § 52(1), breach of a non-effective contract, or a non-tortious misrepresentation, are to be treated in similar terms as the commission of a breach of contract or tort. This means, for example, that a defendant at ‘fault’ in the attenuated definition of § 52(1) cannot rely on the change of position defence (§ 52(3), § 65), and therefore liability to make restitution is not subject to the limitation of returning surviving enrichment only. An assessment of who breached the parties’ (unenforceable) agreement (to take the ‘contract’ example) thus becomes critical to whether liability is one of returning benefits only, or instead one of making good the claimant's loss. The *Restatement* thus appears to give effect to similar loss compensatory principles as those of contract and tort. Presumably, therefore, if A pays money to B under an unenforceable contract, which B expends bona fide on preparation for performance, but B then repudiates, B would not be able to rely on a change of position defence (§ 52(3)). A would thus be entitled to full ‘restitution’, effectively compensating A's loss, since B cannot realistically be said to have been enriched. Such a result is correct, but does not have much to do with unjust enrichment.

The general approach is reflected in the specific rules in the *Restatement*, where numerous examples of the role of fault in determining liability can be found: the rules relating to the mistaken improvement of property, remedies for which frequently turn on the allocation of loss even as between two innocent parties;<sup>49</sup> frustration;<sup>50</sup> claims arising from breaches of

49 See *Restatement*, above n 1, p 115: ‘the remedies for mistaken improvement frequently turn on the allocation of a loss. . . . [and] draw on an amalgam of enrichment and compensation principles, combining a recovery for benefits conferred with an allocation of loss according to relative fault.’

50 *Ibid*, § 34, and pp 552–3.

unenforceable contracts;<sup>51</sup> and the rules relating to rescission.<sup>52</sup> And in one context, that of domestic property disputes arising between former 'unmarried co-habitees' (de facto partners), where notions of fault are not relevant, the *Restatement* adopts a flexible, policy-driven approach that also is not consistent with unjust enrichment principles, conceding that 'some fundamental requirements of a liability in restitution are noticeably relaxed'<sup>53</sup>.

I turn to the change of position defence that may defeat a claim for restitution for money received from a claimant. The *Restatement* states that the relative negligence of both the defendant and claimant should relevantly be considered when applying a change of position defence, such that a balancing of the equities respectively can be made (see § 65 and commentary, particularly (g) and (h) and § 52(3)). On this view of the defence, it is not solely concerned with identifying surviving enrichment.<sup>54</sup> A widely-defined fault concept is again central to the operation of the rules: fault is not limited to 'bad faith' conduct, as it is in the United Kingdom and according to unjust enrichment theory.<sup>55</sup>

By way of comparison, English unjust enrichment theorists generally frown upon attempts to incorporate more equitable, broader standards or concepts into the change of position defence. Unjust enrichment theorists have widely condemned any attempts by courts to seek to 'balance the equities' between defendants and claimants.<sup>56</sup> It is not clear to me why a flexible change of position defence is not an appropriate mechanism for giving recognition to the varying degrees of fault of claimants and defendants, in order to balance their respective interests in the myriad of diverse factual variations that may arise? As the *Restatement* concludes, 'a recipient whose negligence exceeds that of the claimant in the transaction by which the recipient has been unjustly enriched will not be able to defend on the basis of change of position (§ 52(3))'.<sup>57</sup>

51 The 'measure of enrichment may reflect the court's assignment of blame' (*Restatement*, above n 1, p 398) and thus protects claimants against loss (Illustrations 2 and 4, pp 399–400).

52 Although rescission of the transaction could be seen as a form of specific restitution, it is available irrespective of whether any actual gain by the defendant (or corresponding loss to the claimant). See *Restatement*, above n 1, § 54, vol 2, pp 263–4: rescission includes the mutual restoration of performance there under, requiring counter restitution and compensation of defendant's losses, unless the defendant should bear the uncompensated loss and see, in particular § 54(3b).

53 *Restatement*, above n 1, § 28, p 415. See also Saiman, above n 7, at 122, who notes criticisms of the draft § 28 and concludes that 'even the most doctrinally-oriented American scholarship cannot avoid the use of private law doctrines as a tool of social policy'. It would seem that the criticisms that Birks made of earlier policy-driven 'unjust enrichment' reasoning in the same factual context in Canada apply equally here. See P Birks, 'Book Review' (1991) 20 *Can Bar Rev* 814.

54 Hence, in some cases, defendants may not have to give up an enrichment that they still retain, whereas in other cases, defendants may have to make 'restitution' of an enrichment that they no longer have.

55 See the discussion in Birks, *Unjust Enrichment*, above n 10, pp 214–19.

56 As was done in *National Bank of New Zealand v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211 (NZCA). For criticism, see A Burrows, 'Clouding the Issue on Change of Position' (2004) 63 *CLJ* 276, criticising English judgments adopting similar reasoning.

57 *Restatement*, above n 1, vol 2, p 530 (emphasis added) and see also comment h. The *Restatement* does not quite go as far, however, as the NZ Court of Appeal has in *National*



## Proprietary remedies

Further evidence that the *Restatement* is not principally an ideological work and is instead one that retains its 'American' approach to legal methodology can be seen in its pragmatic approach to proprietary remedies. The *Restatement* accepts, as does Australian law,<sup>58</sup> a broad and flexible remedial constructive trust. Under the *Restatement*, such constructive trust may be applied wherever a defendant is 'unjustly enriched by the acquisition of identifiable property' or its traceable substitute (§ 58 and § 59) either as a result of a wrong or by subtraction from the claimant.<sup>59</sup> Further, there is a wide discretion to attach conditions to the remedy in order to 'complete justice'.<sup>60</sup> The *Restatement's* approach again contrasts sharply with that of unjust enrichment theorists and that of the English courts, which display a strong distrust of a flexible approach to remedies with proprietary consequences, seen as a threat to 'fixed' property rights (and perhaps even the rule of law). Hence, the English courts have rejected the remedial constructive trust.<sup>61</sup> As Lord Millett said in *Foskett v McKeown*,<sup>62</sup> in the context of the tracing rules:

Property rights are determined by fixed rules and settled principles. They are not discretionary. They do not depend upon ideas of what is 'fair, just and reasonable'. Such concepts, which in reality mask decisions of legal policy, have no place in the law of property.<sup>63</sup>

The rules are said to reflect nothing more than 'hard-nosed' property law.<sup>64</sup> There are echoes of Birks here:

The business of the lawyer can only be to say with as much precision as possible on what facts proprietary interests arise. 'Do you or do you not have a proprietary

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*Bank of New Zealand v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211 in apportioning losses between parties, rather than merely allocating entirely to one or the other. Although the outcomes of any apportionment based on the parties' respective fault may appear to be arbitrary, so it is with the contributory negligence defence in torts as well, and few seriously argue that there is no need or role for such a defence. A hard and fast rule that the change of position defence does not contain within it the capacity for courts to flexibly consider a range of factors other than the extent of the defendant's disenrichment (and any bad faith on his or her part) may simply be inadequate for the very different type of work it needs to perform.

58 See, eg, *Muschinski v Dodds* (1985) 160 CLR 583; 62 ALR 429; 60 ALJR 52; BC8501051; and *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566; 157 ALR 144; [1998] HCA 59; BC9804991.

59 However, any windfall gains to a defendant that exceeds the claimant's loss is not recoverable as against third party creditors (§ 61).

60 *Restatement*, above n 1, vol 2 p 298.

61 Eg, *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] NLJR 877; [1996] AC 669; [1996] 2 All ER 961; [1996] 2 WLR 802, Lord Browne-Wilkinson concluding that English law has not recognised such a trust. Similarly, in the Privy Council: *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 at 104; [1994] 2 All ER 806; [1994] 3 NZLR 385; [1994] 3 WLR 199, judgment delivered by Lord Mustill.

62 *Foskett v McKeown* [2000] UKHL 29; [2001] 1 AC 102; [2000] 3 All ER 97; [2000] 2 WLR 1299.

63 [2001] 1 AC 102 at 127 per Lord Hoffman (Lord Browne-Wilkinson concurring); [2000] 3 All ER 97; [2000] 2 WLR 1299; [2000] UKHL 29.

64 *Ibid*, at AC 109 per Lord Browne-Wilkinson.

interest?' is, and should remain, a technical question, utterly different from 'Do you or do you not deserve to suffer less than these other colleagues in calamity?'<sup>65</sup>

## Recent Australian cases and the relevant rules in the *Restatement*

Finally, it is an interesting exercise to compare the *Restatement's* solution to two specific issues that the High Court has considered in the last two decades.

The first concerns the liability of a beneficiary of work performed by a claimant, for which work the beneficiary has contracted with a third party to pay. The problem often arises where a sub-contractor who has completed substantial work to the benefit of an owner but has been left unpaid by a head contractor. In a similar context, in *Lumbers v W Cook Builders Pty Ltd (In Liq)*,<sup>66</sup> the High Court took a restrictive approach: the existence of a binding contract with the third party precluded a similar claim. The judgment did not suggest any exceptions and the High Court considered that unjust enrichment had no relevance. The *Restatement* adopts a broadly similar position. Under § 25, a defendant in such cases is not generally enriched, nor is any enrichment 'necessarily unjust'.<sup>67</sup> Nonetheless, in limited circumstances, where a defendant has expressed a willingness to pay for a service (even to a party other than the claimant), saved a necessary expense or realised a benefit in money, and where the defendant will not as a practical matter be required to pay another for the services, (compare § 25(2) and, for example, Illustrations 9, 11 and 13), the *Restatement* considers that there is limited scope for recovery. This appears a slightly more claimant-friendly approach than *Lumbers* appears to adopt.<sup>68</sup>

I turn to the second issue, namely, the relevance of 'passing on'. Where claimants seeking restitution from defendants have themselves recouped their losses from third parties (that is, 'passed on' the losses) the High Court has rejected the view that this forms the basis for denying the plaintiffs' claims, either against government payees (*Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd*)<sup>69</sup> or against private citizens (*Roxborough v Rothmans of Pall Mall Australia Ltd*).<sup>70</sup> This is provided, of course, that the initial transfers of wealth to the defendants were as a result of the receipt of

65 P Birks, 'The Law of Restitution at the End of an Epoch' (1999) 28 WALR 13 at 56.

66 (2008) 232 CLR 635; 247 ALR 412; [2008] HCA 27; BC200804500.

67 *Restatement*, above n 1, p 369.

68 See also the views of Professor Rendleman in the United States, who takes an approach even more claimant-friendly than that of the *Restatement*: D Rendleman, 'Quantum Meruit for the Subcontractor: Has Restitution Jumped off Dawson's Dock?' (2001) 79 *Texas L Rev* 2055. Rendleman treats unjust enrichment as a broad, moral principle that justifies allowing a subcontractor's claim in some circumstances. He considers that the limiting principles used to restrict restitution 'prevent the court from reversing unanticipated specific instances of unjust enrichment' (at 2064) and exist in 'tension with the courts quest for justice, explicit in the policy against unjust enrichment' (at 2057).

69 (1994) 182 CLR 51; 126 ALR 1; 69 ALJR 51; BC9404663, but note the possibility that a successful claimant might in some circumstances hold the proceeds for those parties to whom the losses were passed on. See Brennan J at CLR 90–1 (Toohey and McHugh JJ agreeing) and Mason CJ at CLR 75–6.

70 (2001) 208 CLR 516; 185 ALR 335; [2001] HCA 68; BC200107592. There is some force in Kirby J's dissent, however, particularly at [143].



the claimants' money or property, such receipt being 'at the expense of' the claimant and giving rise to the unjust enrichment of the defendant.<sup>71</sup> The *Restatement* takes the opposite approach: it accepts that a passing on defence will apply in relation to taxes that have been erroneously or unlawfully assessed or collected (§ 19), unless restitution 'would facilitate recovery by the persons ultimately entitled to relief' (§ 64(1b)).<sup>72</sup> This suggests that the notion of corresponding loss is even more critical to the *Restatement*, so that the purpose of the remedy is not only to reverse enrichment but also to overcome loss. Not only must the corresponding loss thus initially come from the claimant (as in Australia), it must *remain* with the claimant: the motive of reversing enrichment in this context appears even less of a concern under the *Restatement* than in Australia.<sup>73</sup>

## Conclusion

The *Restatement* is a magnificent achievement. Obviously, the concept of unjust enrichment is at the very heart of the project. It features prominently in all of the specific rules of the *Restatement*. Perhaps surprisingly, however, although I am an unjust enrichment sceptic, the precise formulations of those rules, the analysis in the commentary, and the outcomes of the illustrations that exemplify those rules, conform for the most part to my own views. Ultimately, the critical test for the validity of the rules in the *Restatement* is whether they conform with the case law and lead to acceptable outcomes, for in my view, of far greater importance than any debate and divisions about grand theory, generic concepts or taxonomical structures, what divides or unites judges and legal commentators is their response to specific factual problems (real or hypothetical). Hence the illustrations in the *Restatement* are invaluable as a test for the justice and efficacy of the adopted rules and they generally confirm the legitimacy of those rules.

Whether unjust enrichment is *needed* to justify many of the conclusions of the *Restatement* is an open question that the *Restatement* itself does not answer. In parts, unjust enrichment appears to be more of a descriptive label; but this is unproblematic since the work as a whole is a brilliant statement of the law as it operates in all its richness, and is a rejection of dogma.

The *Restatement* brilliantly demonstrates the correctness of the High Court's observation in relation to equity, but one that applies equally to the law of restitution, that 'the experience of the law does not suggest debilitation by absence of a sufficiently rigid taxonomy'.<sup>74</sup> If the unjust enrichment theorists were awaiting the *Restatement* as the next major weapon in their crusade, they will be disappointed. I have the suspicion, albeit one whose

71 Ibid, at [26] per Gleeson CJ, Gaudron and Hayne JJ, citing Mason CJ in *Commissioners of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 75; 126 ALR 1; 69 ALJR 51; BC9404663.

72 See *Restatement*, above n 1, p 267, Illustration 18, as well as § 64, and vol 2, pp 508–10, Illustrations 3–6.

73 Unjust enrichment theorists have also generally rejected a passing on defence. See, eg, Edelman and Bant, above n 10, pp 127–8.

74 *Bofinger v Kingsway Group Ltd (formerly Willis & Bowring Mortgage Investments Ltd)* (2009) 239 CLR 269; 260 ALR 71; [2009] HCA 44; BC200909276 at [91]–[94] per Gummow, Hayne, Heydon, Kiefel and Bell JJ.



accuracy will be for the future to determine, that many of the solutions that the *Restatement* adopts will be decried by unjust enrichment theorists. If so, the *Restatement* may well be the first staging point in the turning of the tide against the self-referential (and I would suggest arid) academic theoretical writing that has dominated much of the recent debate. Unlike the *Restatement*, such theory is 'several removes from the life of the law', to quote Gummow J writing extra-judicially in a related context.<sup>75</sup> Perhaps the 'great project'<sup>76</sup> of reordering private law may even crumble. I, for one, would welcome that prospect.

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<sup>75</sup> See Justice W Gummow, 'Equity; Too Successful?' (2003) 77 *ALJ* 30 at 41.

<sup>76</sup> Cf R Sutton, "'We Just Mislaid It': The Great Project and the Problem of Order in Private Law' (2005) 11 *Otago L Rev* 97.